Kenya Pipeline Company Limited v Murimi & Company Advocates (Environment and Land Miscellaneous Application 74 of 2016) [2022] KEELC 13324 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13324 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 74 OF 2016

SO OKONG'O, J

SEPTEMBER 22, 2022

BETWEEN

KENYA PIPELINE COMPANY LIMITED ..... APPLICANT

AND

MURIMI & COMPANY ADVOCATES ..... RESPONDENT

RULING

Background

1. The advocate/respondent (hereinafter referred to only as "the advocate") filed advocate/client bill of costs dated May 9, 2014 (hereinafter referred to only as "the bill") on May 12, 2014 for taxation in respect of the services that it had rendered to the client/applicant (hereinafter referred to only as "the client") in HCCC No 2577 of 1990 (hereinafter referred to only as "the High Court suit"). The bill was filed in the High Court as Miscellaneous Application No 437 of 2014.

2. The client was served with a notice of taxation. The client filed submissions in response to the bill in which it contended that the decree in the High Court suit on which the advocate had based its instruction fees was contested as it was drawn irregularly without the same having been forwarded to the client for approval. Since the court file for the High Court suit was before this court as it concerned a land dispute, an order was made by the High Court Deputy Registrar on April 6, 2016 that the bill be taxed by the Deputy Registrar of this court. The advocate's bill was transferred to this court and registered as ELC Miscellaneous Application No 74 of 2016 which is its current case number.

3. The matter was first mentioned before the Deputy Registrar of this court on June 29, 2016 when only the advocate for the client appeared. On that day, the client's advocate informed the Deputy Registrar that the advocate had indicated to him that the advocate wished to withdraw the bill. The Deputy Registrar stood over the matter generally for the advocate to move the court when ready to tax its bill.

4. The court on its own motion fixed the bill for mention on August 9, 2018. The mention notice was served upon the advocates for the advocate. With regard to the client's advocates, the process server indicated that they had vacated their offices and had moved to unknown place. They were therefore not served. When the bill came up for mention on August 9, 2018, there was no appearance by both parties. That notwithstanding, the Deputy Registrar fixed the bill for taxation on October 1, 2018 and ordered that the parties be served with a notice to appear on that date. Once again, only the advocates for the advocate were served with a notice of taxation. The client's advocates were not served. Come October 1, 2018, again, there was no appearance by both parties. On that date, the Deputy Registrar without representation from any of the parties fixed the bill for ruling on October 25, 2018.

5. The ruling was not delivered on October 25, 2018 as scheduled. It was ultimately delivered the following year on July 11, 2019 in the absence of both parties. There is no indication on record that any of the parties was served with a notice for the delivery of the said ruling. In the ruling, the Senior Deputy Registrar (Hon IN Barasa) (hereinafter referred to only as "the taxing officer") taxed the advocate's bill at Kshs 2,312,597.36 all inclusive. In the said ruling, the taxing officer stated that the bill was to be taxed under the Remuneration Orders of 1983, 1993, 1997, 2006 and 2014. The taxing officer considered the client's written submissions that were on record on the various items on the Bill more particularly the instruction fees that the client had submitted should have been based on Kshs 28,972,868/- which was the correct decretal amount rather than the sum of Kshs 65,219,127.48/- on which the advocate had based the instruction fees claimed in the bill. The taxing officer stated that after perusing the record of the High Court suit, the submissions by the client, the judgment in the High Court suit made on August 1, 2013, the time it took for the suit to be finalized and the interest of the parties in the said suit, she was persuaded that an instruction fees of Kshs 1,000,000/- was fair and reasonable in the circumstances. The taxing officer therefore awarded the advocate a sum of Kshs 1,000,000/- as instruction fees.

6. The taxing officer did not indicate the Advocates Remuneration Order (ARO) that she used to arrive at the said amount and whether the amount was based on the decretal amount of Kshs 28,972,868/- that the client had claimed to be the correct decretal amount or Kshs 65,219,127.48/- on which the advocate had based the amount that it had claimed as instruction fees in the bill. The taxing officer did not also indicate what the basic instruction fees was and whether she increased or reduced the same and the reason for doing so. The taxing officer thereafter proceeded to tax the other items in the bill once again without any indication as to the Advocates Remuneration Order (ARO) that was being used for each item.

The Application To Set Aside The Taxation:

7. The client was aggrieved with the said decision by the taxing officer and filed a chamber summons application dated April 9, 2021 seeking the following orders;

    1. That the court be pleased to extend time for filing a reference against the ruling of the taxing officer, Hon IN Barasa (taxing officer) delivered on July 11, 2019.

    2. That the reference filed herein be deemed as properly filed within the stipulated time.

    3. That the findings and ruling of the taxing officer in which she taxed the respondent's bill at Kshs 2,312,597.36/- be set aside.

    4. That the bill be taxed a fresh.

5. That in the alternative the court be pleased to interrogate the respondent's bill in light of actual work done and adopt the applicant's submissions filed before the taxing officer and make an appropriate award in place of the award that was made by the taxing officer.

6. That the court be pleased to adjust the contested items as the justice of the case may require, in lieu of remitting the same to the taxing officer.

7. That the cost of this application and of the bill be paid by the respondent.

8. That the court be pleased to make any such other order and or orders as it may deem just and appropriate in the circumstances.

8. In the application, the client contended that the matter was mentioned before the taxing officer on August 9, 2018 in absence of the parties when the taxing officer directed that the bill proceeds to taxation on October 1, 2018. The client averred that on October 1, 2018 in the absence of the parties, the taxing officer reserved a ruling date. The client averred that the court file was not made available until July 2020 and that the ruling on taxation dated July 11, 2019 was not supplied to the client until March 2021 despite the payment for the same having been made on July 28, 2020. The applicant averred that the said ruling was delivered despite the expressed intention by the advocate to withdraw the bill being on record.

9. The client averred that its advocates had relocated from their offices at ACK Garden House in January 2015 and that there were letters on record received by the court indicating their new offices at Lenana Towers, 8th floor, Lenana Road when the service of the taxation notice was ordered by the taxing officer. The client averred that its advocates were not aware of the ruling of July 11, 2019 until July 22, 2020 when they tried to fix the matter for taxation and were notified of the existence of the ruling.

In a ruling delivered on February 10, 2022, on the said application, the court made the following orders;

1. The time within which the client was to file a notice of objection to the ruling on taxation delivered on July 11, 2019 was extended by 21 days from the date of the ruling.

2. The client was to file the notice of objection and a reference to the said ruling together within 21 days from the date of the ruling.

3. Pending the hearing and determination of the reference that was to be filed by the client, execution of the ruling and orders made by the taxing officer Hon IN Barasa SDR on July 11, 2019 were stayed.

The Application Before The Court:

10. Pursuant to the said ruling, the client filed a notice of objection to taxation and a reference to the taxation both dated February 23, 2022. In the client's notice of objection, the client challenged the taxing officer's decision on items 1, 10, 36, 37, 38, 39, 45, 67, 87, 92, 96, 113, 114, 117, 137, 140, 147, 160 and 181 of the bill. In its reference brought by chamber summons dated February 23, 2022, the client sought the following orders;

1. That the finding and ruling of Hon IN Barasa on the bill of costs herein dated May 9, 2014 be substituted with an order dismissing the bill of costs for want of prosecution.

2. That the findings and ruling of Hon IN Barasa in ELC Misc Cause No 74 of 2016 taxing the respondent's bill of costs at Kshs 2,312,597.36 be set aside.

3. That this honourable court be pleased to order that the bill of costs be re-taxed afresh.

4. That the honourable court in the alternative be pleased to interrogate the respondent's bill of costs and adopt the applicant's submissions filed on taxation of the costs and make appropriate award in substitution of the award made by the taxing officer on July 11, 2019.

5. That the honourable court be pleased to adjust the contested items as the justice of the case may require in lieu of remitting the contested items to the taxing officer.

6. That the honourable court be pleased to order that costs of this application as well and the costs in the bill of costs be borne by the respondent.

7. That honourable court be pleased to make any such other order and/or orders as it may deem just and appropriate in the circumstances.

11. The application was based on the grounds set out on the face thereof and on the affidavit of Flora Okoth sworn on February 23, 2022. The client contended that the taxing officer made errors of principle in the said ruling in that at the time of considering the bill and rendering the ruling, there was a pending application before court to set aside the decree that was unilaterally extracted against the client in the High Court suit which application was determined on April 18, 2018 and a fresh decree issued on June 8, 2020 in the sum of Kshs 27,943,111.63 from Kshs 65,219,127.48 on which the advocate had based its instruction fees. The client averred that it had raised the question of the contested decree of Kshs 65,219,127.48 in its submissions in response to the bill hence the taxing officer ought to have awaited the court's decision on the issue as she did not have the correct value of the subject matter to assess instruction fees and getting up fees.

12. The client averred further that the taxing officer erred in principle in not setting forth which Advocates Remuneration Order (ARO) she applied considering the fact that the High Court suit in which the advocate had represented the client was filed in 1990. The client submitted that the instruction fees on a judgment sum of Kshs 27,943,111.63 based on 1986 ARO was Kshs 153,965.55. The client submitted that in increasing that sum to Kshs 1,000,000/- the taxing officer increased the basic instruction fees six times. The client submitted that the High Court suit was a simple case of trespass and it was an error of principle on the part of the taxing officer to award such a colossal instruction fees. The client averred further that it was not contested that it had made part payment to the advocate amounting to Kshs 846,358.00/- which the taxing officer did not consider in her ruling. The client submitted that the taxing officer also erred in not dismissing the bill for want of prosecution since the advocate had lost interest in the same. The client averred that the taxing officer misdirected herself and acted contrary to the established principles of taxation of advocate/client bill of cost.

13. The application was served upon the advocate. The advocate did not file a response thereto. The application was heard by way of written submissions. The client filed its submissions dated June 10, 2022. The client submitted that the advocate's bill should be dismissed for want of prosecution. The client submitted that the court has power under section 3A of the *Civil Procedure Act* to make such order since the advocate lost interest in the prosecution of the bill and had expressed an intention to withdraw the same. The client submitted further that in awarding an instruction fees of Kshs 1,000,000/-, the taxing officer committed errors of principle. On this point, the client reiterated the grounds on the face of the application and on the supporting affidavit that I have highlighted above. The client submitted that the taxing officer provided no reason for making an award of Kshs 1,000,000/- as instruction fees. The client submitted that in making the said award, the taxing officer did not exercise her discretion judiciously. The client submitted that in making the award, the taxing officer did not take into account the correct value of the subject matter of the High Court suit. The client submitted that the taxing officer appeared to have taken the value of the subject matter of the suit as Kshs 65,219,127.48 as opposed to a sum of Kshs 27,943,111.63 that was the correct decretal

amount certified by the court on June 8, 2020. The client submitted that the decretal sum of Kshs 65,219,127.48 on which the taxing officer based her assessment of the instruction fees was set aside by the court on April 18, 2018 on an application that was pending when the taxing officer made the impugned ruling and in respect of which the attention of the taxing officer had been drawn. The client reiterated that the taxing officer erred in her failure to set forth the ARO and the relevant schedule on which she taxed the advocate's bill. The client submitted that the High Court suit was filed in 1990 when the defence was also filed. The client submitted that the advocate's instruction fees in the suit should have been based on schedule VI of the 1983 *ARO* that was in force at the material time. The client submitted that using the 1983 *ARO*, instruction fees in a suit where the decretal amount was Kshs 65,219,127.48 was supposed to be Kshs 340,345.64. The client submitted that the taxing officer increased this basic instruction fees three times to arrive at her award of Kshs 1,000,000/-.

14. The client submitted further that the correct decretal amount was Kshs 27,943,111.63 and that applying the said 1983 *ARO*, the basic instruction fees should have been Kshs 153,965.55. The client submitted that the taxing officer increased this amount six times to arrive at the award of Kshs 1,000,000/-. The client submitted further that any amount found payable to the Advocate should have been reduced by Kshs 846,358/- being part payment that the client had made to the advocate in respect of which the advocate had admitted a sum of Kshs 806,608/- in its bill. The client urged the court to allow the application.

15. I have considered the reference together with the affidavit filed in support thereof. I have also considered the submissions filed by the advocates for the client. In my view there is only one issue arising for determination in this Reference namely; whether valid grounds have been put forward to warrant interference by the court with the decision of the taxing officer made on July 11, 2019.

16. In *Nyangito & Co Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR, the court stated that:

> " The circumstances under which a judge of the High Court interferes with the taxing officer's exercise of discretion are now well known. These principles are:
>
> 1. that the court cannot interfere with the taxing officer's discretion on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle;
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> 2. it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the remuneration order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
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> 3. if the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the judge is satisfied that the error cannot materially have affected the assessment and the court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
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> 4. it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary."

17. In the South African case of *Visser v Gubb* 1981 (3) SA 753 (C) 754H – 755 C that was cited with approval in *KTK Advocates v Baringo County Government [2017] eKLR*, the court stated as follows:

> " The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue.... The court must be of the view that the taxing officer was clearly wrong, i.e its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

18. The reference before the court is in respect of taxation of nineteen (19) items in the advocate's bill dated May 9, 2014. I find no merit with respect to taxation of items 10, 36, 37, 38, 39, 45, 67, 87, 92, 96, 114, 117, 137, 140, 147, 160 and 181 of the bill. Items 10, 36, 38, 45, 87, 92, 96, 114, 117 and 160 were taxed by the taxing officer in accordance with the client's written submissions dated September 22, 2014 that were made before the taxing officer. The said items were therefore taxed in accordance with the relevant ARO. With regard to items 67 and 147, the client had proposed Kshs 7000/- and 25,000/- respectively in its submissions. The taxing officer taxed the two items at Kshs 3500/- and Kshs 10,000/- respectively which were less than what the client had proposed. I therefore find no merit in the challenge mounted by the client against these two items. With regard to items 137, 140 and 181, the same were taxed off in their entirety by the taxing officer. I am unable to understand therefore why the client is challenging the same while no award was made in respect thereof. With respect to item 37, the item was taxed under schedule VI(7)(d) of the 1993 *ARO*. The item was in respect of court attendance for 1 hour. According to schedule VI(7)(d)(iii) of the 1993 *ARO*, the costs payable for such attendance was Kshs 1,200/-. That is what was awarded by the taxing officer. I therefore find no merit in the objection that has been raised in respect of this item.

19. Due to the foregoing, the reference before the court is actually against taxation of items 1 and 113 of the bill which concerns instruction fees and getting up fees. Getting up fees where it is payable is a fraction of the instruction fees. The main contention therefore is on the instruction fees. It is not disputed that the instruction fees is to be determined from the value of the subject matter of a suit. It is also not disputed that the value of the subject matter of a suit is to be ascertained from the pleadings, judgment or settlement. It is also common ground that where the value of the subject matter cannot be ascertained from the pleadings, judgment or settlement, the taxing officer has a discretion to assess the instruction fees taking into account various factors.

20. In this case, there was a judgment that had been made in the High Court suit from which the value of the subject matter could be ascertained. The exact decretal amount had to be agreed on by the parties or settled by the court if the parties were unable to agree on the same. As at the time the bill was filed, a unilateral decree extracted by the plaintiff in the said High Court suit had put the decretal amount at Kshs 65,219,127.48/-. This decree was set aside and a new decree issued in the sum of Kshs 27,943,111.68 on June 8, 2020.

21. In its submissions before the taxing officer, the client pointed out to the taxing officer that the decree that the advocate had relied on as a basis for his instruction fees was unilaterally extracted and that the client had made an application to have the same set aside. The client had submitted that as at the time of the submissions, the decretal amount was Kshs 28,972,868.00 according to its computation and not

Kshs 70,698,952.70 on which the advocate had based its instruction fees in the bill. It follows therefore that the taxing officer had before her, the unilateral decree in which the decretal sum was indicated as Kshs 65,219,127.48/-. Then there was the sum of Kshs 70,698,952.70 on which the instruction fees claimed in the bill was based and the sum of Kshs 28,972,868.00 which the client claimed to be the correct decretal sum from the judgment of the High Court. As at the time the client was making the submissions, the said unilateral decree had not been set aside and as such the revised decretal sum of Kshs 27,943,111.68 was not before the taxing officer.

22. I am of the view that the first task before the taxing officer was to decide on the decretal amount on which she was going to base her assessment of the instruction fees. After determining the correct decretal amount, she was then to assess the basic instruction fees payable on the said amount and thereafter consider whether to increase the same. From the taxing officer's ruling, it is not clear whether the taxing based her assessment of instruction fees on Kshs 65,219,127.48/-, Kshs 70,698,952.70 or Kshs 28,972,868.00. I am saying this because the taxing officer did not state what the basic instruction fees was and whether she increased it or not. While assessing instruction fees, the taxing officer stated as follows:

> " I have carefully perused the bill of costs, the court record in HCCC No 2577 of 1990 as well as the submissions filed and authorities availed by the applicant. I have perused the judgment of the court dated 1st August 2013. I have also noted the length of time that it took for the suit to be finalized. I have noted the interest of the parties in the suit, the numerous court appearances, correspondence between the parties, the pleadings and documents filed. I am persuaded that an instruction fee of Kshs. 1,000,000/- in this case is fair and reasonable. I tem 1 is so taxed. Kshs. 542,736.40 is taxed off."

23. The taxing officer stated in the ruling that the applicable *AROs* were 1983, 1993, 1997, 2006 and 2014 which I have no doubt that she applied although she did not expressly state so in the ruling. The applicable ARO for the assessment of instruction fees was 1983 *ARO*. In assessing instruction fees, the taxing officer had a duty to state the basic instruction fees based on whatever amount she had considered to be the correct decretal amount. Without stating the value of the subject matter on which she based the instruction fees or the basic instruction fees, this court is unable to ascertain how the taxing officer exercised her discretion in arriving at the instruction fees of Kshs 1,000,000/-. The award had no basis in the circumstances. This was a fundamental error of principle on the part of the taxing officer.

24. Even if it is assumed that the taxing officer took the sum of Kshs 65,219,127.48/-that was indicated in the contested decree as the correct decretal amount, the basic instruction fees based on the said amount would come to about Kshs 340,000/-. I am of the view that an award of Kshs 1,000,000/- made by the taxing officer which was three times the basic instruction fees was excessive and amounted to an erroneous exercise of discretion. Having reached the conclusion that the taxing officer committed several errors of principle, an order setting aside the taxation is inevitable. What I need to determine at this stage is whether to send back the Bill to the taxing officer for taxation afresh or to proceed to tax the contested items. I have the discretion to either remit the bill to the taxing officer with appropriate directions on how it should be taxed or to proceed and tax the same. In *Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board* [2005] 1 KLR 528 the court stated as follows:

> " And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – D'Sonza v Ferrao [1960] EA 602. The judge has however a discretion

to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji Naran Patel (No 2) [1978] KLR 243."

25. The dispute between the parties over fees has been pending since 2014. As indicated above, only two items in the bill are validly contested, the main one being the instruction fees. I am of the view that it would serve the interest of justice if the court exercises its discretion in favour of taxing the Bill instead of remitting the same to the taxing master for the taxation of these items. In F*irst American Bank of Kenya Ltd v Gulab P Shah & others* (2002) 1 EA 61 the court stated that:

> " I have asked myself whether I should remit the bill back to the taxing officer with directions that she should determine the instruction fees ... I am convinced in my mind that that would be a waste of judicial time in the circumstances of this case. I would also saddle the parties with further unnecessary costs. I think the just course of action in this matter is for this court to exercise its discretion in a reference on taxation to determine the matter with some finality."

26. As I have mentioned earlier in the ruling, the taxing officer was informed that the decree on which the advocate had based its bill had been extracted by the plaintiff in the High Court suit unilaterally and that an application had been filed in the said suit to set it aside. The said decree was ultimately set aside and a new decree for Kshs 27,943,111.63 issued on June 8, 2020. Now that the taxation is being set aside for the reasons already given, it is on this sum of Kshs 27,943,111.63 that I will assess the instruction fees. The basic instruction fees on the decretal sum of Kshs 27,943,111.63 based on the 1983 *ARO* is Kshs 140,715/-.

27. I am in agreement with the client that the High Court suit was an ordinary dispute over trespass to land. I am of the view however that the client had a lot of interest in the matter. That explains the advance payment to the advocate of Kshs 846,358/- on account of fees. Taking into account the foregoing factors and the fact that the basic minimum instruction fees is Kshs 140,715/- as aforesaid/-, I will tax the instruction fees at Kshs 300,000/-. The getting up fees being a quarter of the instruction fees according to the 1983 *ARO* is taxed at Kshs 75,000/-.

28. Before concluding the matter, I have noted that the client had prayed in its application that I do consider dismissing the bill for want of prosecution. What is before me is a reference brought under paragraph 11 of the *Advocates Remuneration Order*. This court has no jurisdiction under the said paragraph of the *Advocates Remuneration Orde*r to dismiss a bill of costs that has been taxed and is the subject of a reference for want of prosecution. I therefore find no merit in that limb of the application.

29. In conclusion, the client's chamber summons application dated February 23, 2022 is allowed on the following terms;

    1. The decision of the taxing officer made on July 11, 2019 in respect of instruction fees and getting up fees (items 1 and 113) in the bill of costs dated May 9, 2014 is set aside and in place thereof, the said items are taxed as follows;

        i. Item 1 is taxed at Kshs 300,000/-. A sum of Kshs 1,242,736.90 is taxed off.

        ii. Item 113 is taxed at Kshs 75,000/-. Kshs 439,245.63 is taxed off.

    2. The other items in the bill shall remain as taxed by the taxing officer save that the advocate/client cost and VAT shall be adjusted accordingly and a sum of Kshs 846,358/- being the advance payment made to the Advocate by the Client shall be deducted from the costs due to the advocate.

3. Each party shall bear its own costs of the reference.

DELIVERED AND DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

S OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr Opwaka h/b for Mr Kisaka for the client/applicant.

N/A for the advocate/respondent.

Ms C Nyokabi - court assistant.